

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

BS

Date:

NOV 29 2012

Office: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Professional Holding an Advanced Degree or an Alien of Exceptional Ability pursuant to section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg

Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a provider of financial services software and systems. It seeks to employ the beneficiary permanently in the United States as a lead software engineer, pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not demonstrated its continuing ability to pay the beneficiary the proffered wage since the priority date. The director denied the petition accordingly.

On appeal, counsel asserts that the petitioner has the continuing ability to pay the beneficiary the proffered wage since the priority date. Counsel contends that the petitioner has increased its assets by \$1,000,000.00 from a recent stock sale. Counsel submits a letter from the petitioner's [REDACTED] a copy of a stock purchase agreement between the petitioner and [REDACTED] two letters from the [REDACTED] of [REDACTED] copies of the petitioner's bank statements, and a copy of the petitioner's balance sheet as of September 9, 2011, in support of the appeal.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's denial of August 22, 2011, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089 as certified

by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 9089 was accepted for processing on February 25, 2010. The proffered wage as stated on the Form ETA 9089 is \$113,651.00 per year. The Form ETA 9089 states that the position requires a bachelor's degree in engineering and 60 months experience in the alternate occupations of either vice president of technology or lead engineer. Part H. 14 further describes the required work experience as follows:

five years of progressive experience developing secure, distributed, on-line systems for the financial services industry, including 3 years experience using Java enterprise technology platform and cloud computing technologies.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 2009, to have a gross annual income of \$1,000,00.00, and to currently employ 4 workers. According to the tax returns in the record, the petitioner's fiscal year runs with the calendar year. On the Form ETA 9089, signed by the beneficiary on July 16, 2010, the beneficiary claimed to have been employed by the petitioner in the offered job of lead software engineer since October 1, 2009.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

The record contains a Form W-2, Wage and Tax Statement, for the year 2010 and three paycheck stubs for the year 2011, reflecting employee compensation paid to the beneficiary by the petitioner as follows:

- 2010 – \$83,333.40 (\$30,317.60 less than the proffered wage of \$113,651.00)
- 2011 – \$41,666.70 as of August 31, 2011 (\$71,984.30 less than the proffered wage of \$113,651.00)

The petitioner failed to establish that it paid the beneficiary the full proffered wage of \$113,651.00 in 2010 and 2011. Although the petitioner must demonstrate the ability to pay the full proffered wage in 2010 and 2011, it must be noted that the petitioner is only obligated to show that it could have paid the difference between the proffered wage and wages already paid in 2010 and 2011.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the

years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The petitioner's Form 1120 tax return lists its net income as shown in the table below.

- In 2010, the Form 1120 stated net income² of <\$645,520.00>.³
- The petitioner failed to provide its Form 1120 tax return for 2011, which was not due at the time the appeal was filed.

The petitioner did establish that it had sufficient net income to pay the difference between wages paid to the beneficiary and the full proffered wage since the priority date.

As an alternate means of determining the ability of the petitioner to pay the proffered wage, USCIS may review its net current assets. Net current assets are the difference between a corporate entity's current assets and current liabilities.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the corporation is expected to be able to pay the proffered

² For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return.

³ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

⁴ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

wage using those net current assets. The tax returns of the petitioner demonstrate its end-of-year net current assets as shown in the table below.

- In 2010, the Form 1120 stated net current assets of \$0.00, apparently because it was not required to complete the Schedule L.
- The petitioner failed to provide its Form 1120 tax return for 2011.

The petitioner did not establish that it had sufficient net current assets to pay the difference between the proffered wage and wages already paid since the priority date.

The record contains two letters dated December 2, 2009 and January 18, 2011, respectively, which are both signed by the [REDACTED]. In the letter dated December 2, 2009, [REDACTED] indicated that [REDACTED] completed an equity investment of \$500,000.00 in the petitioner on an unspecified date in addition to providing the petitioner with a \$500,000.00 line of credit in November 2009. In the letter dated January 18, 2011, [REDACTED] stated that [REDACTED] extended a \$1,000,000.00 line of credit to the petitioner in November 2010, which the petitioner had not accessed as of the date of this letter.

In calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the petitioner's credit limits, bank lines, or lines of credit. A limit on a credit card cannot be treated as cash or as a cash asset. Further, a "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Since a line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from these lines of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Also, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). Finally, the record is devoid of the terms of this line of credit

or evidence that [REDACTED] honored this line of credit in the year of the priority date.

Counsel contends on appeal that the petitioner has increased its assets by \$1,000,000.00 from a recent stock sale. In support of this contention, counsel submits a copy of a stock purchase agreement dated July 29, 2011, between the petitioner and [REDACTED], in which the petitioner agreed to sell 621,118 shares of its common stock to [REDACTED] for \$1,000,000.00. The stock purchase agreement is signed by [REDACTED] on the petitioner's behalf and [REDACTED] on behalf of [REDACTED]

The record contains copies of bank statements for the petitioner's checking account at [REDACTED] Bank dated January 31, 2011, February 28, 2011, March 31, 2011, April 30, 2011, May 31, 2011, June 30, 2011, July 31, 2011, and August 31, 2011. These accounts reflect the following deposits: \$100,00.00 on January 26, 2011, \$100,000.00 on March 1, 2011, \$100,000.00 on April 5, 2011, \$50,000.00 on April 28, 2011, \$100,000.00 on May 20, 2011, \$50,000.00 on June 15, 2011, \$85,000.00 on June 30, 2011, \$100,000.00 on July 28, 2011, \$125,000.00 on August 11, 2011, \$294,000.00 on August 11, 2011 and \$125,000.00 on August 19, 2011. However, it is not possible to determine the nature and source of these deposits from the bank statements, much less that such source was [REDACTED]. Even if [REDACTED] made such payments to the petitioner as reflected in these deposits, any funds provided by [REDACTED] prior to July 29, 2011 must be considered to be derived from the \$1,000,000.00 line of credit extended to the petitioner by [REDACTED] in November 2010 as referenced to by [REDACTED] in his letter dated January 18, 2011. Further, the deposits made after July 29, 2011, the date of the purported sale of 621,118 shares of the petitioner's common stock to [REDACTED] for \$1,000,000.00, amount to only \$544,858.00. The petitioner has failed to provide any evidence demonstrating that [REDACTED] has subsequently paid any portion of the remaining balance of \$466,142.00 to the petitioner as a result of the July 29, 2011 stock sale. Nevertheless, even if the evidence established that these deposits by the petitioner were derived from payments by [REDACTED] the petitioner's checking account represents cash needed to conduct the financial transactions involved in the petitioner's regular day-to-day operations rather than a readily available asset that could be used to continually pay the proffered wage to the beneficiary since the priority date. It is noted that the petitioner did not submit an audited financial statement or federal tax return for 2011, either of which would have given a complete and accurate picture of the petitioner's financial abilities and the relevance, or existence, of the claimed assets. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Finally, any reliance on the balance in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a

given date, and cannot show the sustainable ability to pay a proffered wage. Overall, these bank statements do not establish that the petitioner more likely than not had the continuous and sustainable ability to pay the proffered wage since the priority date.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612. That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, no evidence has been presented to show that the petitioner has a sound and outstanding business reputation as in *Sonegawa*. Nor has the petitioner included any evidence or detailed explanation of its milestone achievements or accomplishments. In addition, the petitioner has neither claimed nor provided any evidence demonstrating that it suffered any uncharacteristic business losses that prevented its continuing ability to pay the beneficiary the proffered wage as of the priority date. Further, no evidence has been presented to show that the petitioner's officers are willing and able to sacrifice or forego past, present, or future compensation to pay the beneficiary's proffered wage.

Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.